IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.882 OF 2005

Maharashtra State Electricity Board .. Petitioner

Versus

1. State of Maharashtra,
   through Director of Industries.

2. M/s.Bhushan Steel & Strips Ltd.

3. Vipras Castings Limited.

4. Maharashtra State Electricity
   Regulatory Commission.

5. Union of India. .. .. Respondents

Mr.G.R.Joshi with Mrs.Deepa Chavan i/by M/s.Little & Co. for petitioner.

Mr.L.T. Satelkar, AGP for respondent No.1.

Mr.P.N. Mody with A.N. Jakhadi for respondent No.2

Mr.O.J.Menezes for respondent No.3.

Respondent No.4 is served.

Mr.Rajiv Chavan with Mr.D.A.Dubey for respondent No.5.

CORAM : H.L. GOKHALE &
S.C.DHARMADHKARI, JJ.

DATE OF RESERVATION OF JUDGMENT : 30TH MARCH 2005
DATE OF PROUNCEMENT OF JUDGMENT : 4TH APRIL 2005

JUDGMENT : (Per H.L. Gokhale, J.)

1. The petitioner herein is Maharashtra State Electricity Board (for short "MSEB") constituted

under the provisions of the Electricity Supply Act, 1948. It is a Board as defined under Section 2(7) of the Electricity Act, 2003. Respondent No.2 and Respondent No.3 were the consumers of power of the petitioner. Respondent No.2 has set up a Captive Power generating Plant (CPP) and is supplying power to respondent No.3 which is one of the biggest defaulters of the petitioner. Respondent No.4 is the State Regulatory Commission of the State of Maharashtra constituted under the provisions of the Electricity Regulatory Commission Act, 1998. The petitioner had filed an Application which is numbered as Case No.57 of 2003 before respondent No.4. This Application sought a declaration that respondent No.2 was not entitled to sell power to third party in the absence of a valid licence as required under Sections 12 to 15 of the Electricity Act, 2003. The petitioner further sought an order that respondent No.2 be forthwith stopped from selling the electricity in whatsoever manner or engaging in distributing, or transmitting or trading thereon without an appropriate licence. That Case No.57 of 2003 came to be dismissed by the order dated 3rd August 2004 passed by respondent No.4. The present petition is filed to challenge the

said order and to seek appropriate interim orders against respondent Nos.2 and 3.

2. The petition came up for consideration for admission on 15th March 2005 when it was admitted. The petitioner prayed for appropriate interim orders. However, a submission was made on behalf of respondent Nos.2 and 3 that granting of interim relief will almost mean disposal of the petition. Therefore, considering urgency of the matter, it was heard finally at the earliest thereafter. Respondent No.3 has filed its reply and Respondent No.2 its written submissions.

3. The brief facts leading to the present petition are as follows:-

. Respondent No.2-Company had applied to the petitioner for setting up an electric connection of 5 Mega Watt (MW) in respect of a plant that it was setting up to manufacture cold rolled sheets in village Nifan, Taluka Khalapur, District Raigad. That application was made on 15th January 2001. Subsequently respondent No.2 sought permission from the petitioner under Section 44 of the Electricity (Supply) Act, 1948 for

installation of a furnace oil based Captive Power Plant at the said location with the power generation capacity of 24 MW. The petitioner granted consent as required on 12th September 2001 to set up two CPPs of 12 MW each. Condition No.2 of the consent letter was that respondent No.2 was not permitted to sell surplus power, if any, to any third party and/or to the Board.

4. The Electricity Act, 2003 came into force on 2nd June 2003. The CPP set up by respondent No.2 became operational and was commissioned thereafter sometimes in September 2003. Respondent No.2-Company had established a capacity of 24 MW, out of which it needed 14 MW for its own consumption. It had surplus power which it wanted to sell to adjoining plants including respondent No.3. Respondent No.3 is a Sick Industrial Undertaking whose affairs are pending before BIFR. It has defaulted in its payment to the petitioner and, therefore, its supply has been dis-connected by the petitioner. Respondent No.3 owed an amount of Rs.13.44 Crores to the petitioner as in September 2003.

5. Respondent No.2 wrote to respondent No.4 -

Maharashtra State Electricity Regulatory Commission (for short "MERC") on 22nd July 2003 informing that it wanted to sell the power to the nearby plants. It sought a guidance from MERC, though in its view, generation and selling power did not require any licence. MERC wrote back on 28th July 2003 informing that MERC does not give any advice regarding interpretation of the Electricity Act except by the process of deciding the matters which come before it. MERC, however, informed that, prima facie, it seems that no licence or NOC was required under the Act for selling surplus power from the CPP to a third party through one's own transmission lines. Respondent No.2 had also written similar letter to the State Government which also advised similarly by letter dated 24th September 2004. It, therefore, started generation of power and supplying it to respondent No.3.

6. The petitioner-MSEB felt aggrieved by this action of respondent No.2 and, therefore, filed a Miscellaneous Application to respondent No.4-MERC which came to be numbered as Case No.57 of 2004. Amongst others, it was prayed in the application that it be declared that respondent No.2 is not

entitled to sell power to third party in the absence of valid licence under Sections 12 to 15 of the Electricity Act, 2003. It also sought an injunction restraining respondent No.2 from supplying power to respondent No.3. Respondent Nos.2 and 3 filed their replies on 10th March 2004 and the matter was heard by respondent No.4 leading to the impugned order dated 3rd August 2004.

7. As can be seen from the impugned order, the main issue raised before MERC was as to whether respondent No.2, having surplus power from its CPP, could sell power to third party without the licence or permission. MERC gave its findings in Para-57 of its order as follows:-

> " 57. In sum, the Commission finds, inter alia that:
>
> (a) the plant set up by BSSL fulfils the definition of CPP under EA, 2003.
>
> (b) after using the CPP power mostly for their own requirements, BSSL can sell the remaining power to third parties using

> their own dedicated transmission lines without a licence or other permission from the Commission.
>
> (c) VCL can purchase power from BSSL without any permission from the Commission and without payment of any additional surcharge under Section 42(4). "

MERC, therefore, dismissed the petition filed by the petitioner.

8. Mr.Joshi, learned Counsel appearing for the petitioner, submitted that out of three findings which were given by MERC, the third finding in clause (c) of its order, was not at all sought by the petitioner. That was not an issue on which any contest took place before MERC and, therefore, the finding was totally uncalled for. This being the position, he principally challenged the finding given in clause (b) of the impugned order. In this behalf, he firstly submitted that selling of its power by respondent No.2 was in violation of condition No.2 of the consent given by the petitioner on 12th September 2001 to respondent No.2 to set up the CPP. This condition

specifically prohibited respondent No.2 from selling surplus power, if any, to any third party and/or to the Board. It was, however, noted that this condition was imposed while entertaining the application under Section 44 of the Electricity (Supply) Act, 1948 which has now been repealed by Section 185 of the Electricity Act, 2003. This new Act has come into force on 2nd June 2003, whereas the CPP of respondent No.2 has been commissioned from September 2003. This being the position, this objection cannot survive.

9. The main objection raised by Mr.Joshi, however, was that in view of the specific provisions of Sections 12 to 15, no person can transmit, distribute or undertake trading in electricity as laid down under Section 12, unless he is authorised to do so by a licence issued under Section 14, or is exempt under Section 13 of the Electricity Act, 2003. Sections 12, 13 and 14 appear in Part IV of the Electricity Act, 2003 which is on Licensing. Sections 12, 13 and the principal part of Section 14 (excluding the provisos of Section 14) read as follows:-

"**12. Authorised persons to transmit**

supply etc., electricity.

No person shall

(a) transmit electricity; or

(b) distribute electricity; or

(c) undertake trading in electricity,

unless he is authorised to do so by a licence issued under section 14, or is exempt under section 13.

13. Power to exempt. - The Appropriate Commission may, on the recommendations of the Appropriate Government, in accordance with the national policy formulated under section 5 and in the public interest, direct by notification that subject to such conditions and restrictions, if any, and for such period or periods, as may be specified in the notification, the provisions of section 12 shall not apply to any local authority, Panchayat Institution, users' association,

co-operative societies, non-governmental organisations, or franchisees.

14. Grant of licence. - The Appropriate Commission may, on an application made to it under section 15, grant a licence to any person-

(a) to transmit electricity as a transmission licensee; or

(b) to distribute electricity as a distribution licensee; or

(c) to undertake trading in electricity as an electricity trader, in any area as may be specified in the licence. "

Mr.Joshi submitted that the language of these sections was unambiguous. The moment any person was selling power, he has to have the licence and the finding in clause (b) of MERC's order was on the face of it bad in law.

10. As can be seen from Para 57(b) of the impugned order, MERC has held that respondent No.2

can sell the excess power to third parties using its own dedicated transmission lines without a licence. The order proceeds on the footing that respondent No.2 was admittedly not engaged in the business of supplying electricity. It was a manufacturer of steel. It was having excess power in its CPP. Section 9(1) of the Electricity Act, 2003 permitted setting up of a CPP. The CPP had been defined under Section 2(8) of this Act to mean a power plant set up to generate electricity primarily for one's own use and, therefore, such a distribution of power to third parties was permissible.

11. Mr.Joshi submitted that this reasoning was fallacious. Section 9 of the Electricity Act, 2003 which permits setting up of a CPP appears in Part III of the Act which is on Generation of electricity and it permits a person to construct, maintain or operate a captive generation plant. When it comes to supply or sell power, that is governed under Part IV, which is on Licensing. The moment a person transmits, distributes or undertakes trading in electricity, he has to have a licence, unless he is exempted by the appropriate Government under Section 13 of the

Electricity Act, 2003 or he is generating and distributing electricity in rural area as provided in the last but one proviso of Section 14 of the Electricity Act, 2003 which reads as follows:-

> " Provided also that where a person intends to generate and distribute electricity in a rural area to be notified by the State Government, such person shall not require any licence for such generation and distribution of electricity, but he shall comply with the measures which may be specified by the Authority under section 53. "

He submitted that it is immaterial that the CPP set up by respondent No.2 is primarily for its own use. The moment it sells power to third party, sections 12 and 14 will get attracted.

12. Mr.Mody, learned Counsel appearing for respondent No.2, on the other hand, submitted that respondent No.2 had excess power. It was having its own CPP. This power was being made available to respondent No.3. He further submitted that MERC as well as the State Government had given

their opinion to respondent No.2 that there was no need of any licence. Over and above that, now, there is the order of MERC, which, in his submission, is in accordance with the spirit of the Act.

13. Mr.Mody submitted, firstly, that the petitioner was a competitor of respondent No.2 inasmuch as both wanted to sell power. A competitor in the business cannot seek to prevent another from exercising his right to carry on business on account of some alleged fault on the part of the petitioner. Assuming that any sanction was required to be taken by respondent No.2, once the permission was granted by the appropriate Authority viz. MERC, the petitioner had no locus standi to challenge such permission. In this behalf, Mr.Mody relied upon a judgment of the Apex Court in the case of **The Nagar Rice and Flour Mills & others vs. N. Teekappa Gowda & Bros. & others reported in AIR 1971 S.C. page 246**. He then relied upon a judgment of the Orissa High Court in the case of **Titagarh Paper Mills Co. Ltd. vs. State of Orissa & others reported in AIR 1975 Orissa page 90** to submit that a party seeking a writ must show that it has a legal right

and that such right had been infringed. In his submission, the petitioner had no such right to object to respondent No.2. Merely because such party had filed an objection, it cannot be permitted to file a writ petition. Mr.Mody relied upon a judgment of the Rajasthan High Court in the case of **Ram Rakh Vyas vs. The Union of India & others reported in AIR 1977 Rajasthan 243** wherein the petition of an Advocate from Jaipur challenging the constitution of the High Court Bench at Jodhpur was dismissed on the ground that he was not a person interested and affected. Lastly, he relied upon a judgment of the Kerala High Court in the case of **V.D. Kumarappan vs. Secretary, Home Department, Trivandrum reported in AIR 1960 Kerala 378**. In that matter, the petitioner, who was a landlord, had objected to the grant of a fresh licence to the respondent-lessee to exhibit films in the theatre which he was running in the tenanted premises. A Division Bench of the Kerala High Court held that the petitioner had no locus standi and had no right to apply for certiorari.

14. Mr.Mody further submitted that the Act was passed to bring in a system based on open access.

That was passed because there were shortages of power. He referred to the aims and objectives of the Act in this behalf which emphasize liberalisation of regulations in this behalf, so that there is more generation of power. He further submitted that if the provisions of Sections 12 to 15 were read in the manner in which they were sought to be read by the petitioner, it will lead to licence becoming necessary to a party manufacturing power for itself but having some excess power which it is selling to somebody else. If a licence becomes necessary, the stringent provisions of Sections 19, 20 and 40 of the Act will also apply to such licences. Section 40 of the Electricity Act, 2003 imposes duties on transmission licensee which require it to make available to others its transmission system for use of any licensee on payment of transmission charges. Section 19 of the Electricity Act, 2003 gave the power to the appropriate Commission to revoke the licence on various conditions which are stated therein and Section 20 provided that where the licence was revoked under sub-section (1)(b) thereof, the appropriate Commission may require the licensee to sell his utility. He submitted that a CPP has been defined under Section 2(8) of

the Electricity Act, 2003 to mean a plant primarily for one's use only. If such power plant was permitted to be set up under Section 9 of the Electricity Act, 2003, that plant could not be directed to obtain the licence as required under Section 12 of the Electricity Act, 2003 merely because some excess power was being distributed or sold to some third party. He drew our attention to the definition of transmission licensee and distribution licensee. A transmission licensee is defined as a licensee who establishes or operates transmission lines. Transmission lines are defined in a very wide way which include various apparatuses from generating station until the supply is effected. This supply has to be for an area of supply. Respondent No.2 did not have any such area of supply nor such equipments. It was having only the dedicated transmission lines as required under Section 9 of the Electricity Act, 2003. The distribution licensee required an area of supply and the petitioner did not have it. Respondent No.2 also did not have it and, therefore, there was no occasion to obtain either the distribution licence or the transmission licence. He, therefore, submitted that the petition should be dismissed.

15. Mr.Menezes, learned Counsel appearing for respondent No.3, submitted that undoubtedly respondent No.3 was in arrears of the dues to the petitioner but it was agreeable to pay for consumption of power by honouring the current bills of MSEB. As far as the arrears are concerned, that is an aspect which will be looked into when the matter before the BIFR is decided. Respondent No.3 is engaging some 300 employees whose jobs are dependent on running of the plant. In his submission, the present petition is nothing but a pressure tactic. The petitioner is being unreasonable in the sense that it must get either its dues or respondent No.3 shall not function. He further submitted that in a matter like this only the current charges should be insisted by MSEB and the arrears should be paid when the matter before the BIFR is decided. Mr.Menezes relied upon an order of the Apex Court in the case of **C.E.S.C. Limited & others vs. Bowrech Cotton Mills Co. Ltd. & others reported in 1993 Suppl. (1) SCC 451** in this behalf.

16. Mr.Menezes further submitted that respondent No.3 had shown its willingness for

appropriate terms by making an application to MSEB way back on 9th February 2005. Respondent No.3 has filed an affidavit-in-reply raising its submissions. He further submitted that the petition is filed belatedly i.e. some five months after the order of MERC and on that ground alone, it ought to be dismissed.

17. We have considered the submissions of the petitioner as well as of the respondents. As far as the submission with respect to the delay made by respondent No.3 is concerned, in our view, there is no substance inasmuch as no prejudice has been caused either to respondent No.3 or respondent No.2 on account of this delay. Similarly as far as the submissions based on the judgment in the case of Bowrech Cotton Mills Co.Ltd. (supra) are concerned, that is a matter of appropriate arrangement, provided MSEB is willing to supply power to respondent No.3. That question does not arise in the present case.

18. As far as the various authorities relied upon by Mr.Mody are concerned, the judgment in the case of Nagar Rice and Flour Mills (supra) cannot have any application for the reason that the

petitioner is not a competitor of respondent No.3. It is a State Transmission Utility under Section 15(3) of the Electricity Act, 2003, to which an application for grant of licence has to be forwarded. Thus, the petitioner has a say on every such application under the scheme of the Electricity Act, 2003. Similarly, the judgment in the case of Titagarh Paper Mills Co. Ltd. (supra) also will not apply to the present case. The petitioner does have a legal right to object to any such party selling power without a licence. It can certainly enforce this right by seeking a writ. As far as the judgment in the case of Ram Rakh Vyas (supra) is concerned, certainly the Advocate concerned had no locus to object to the constitution of the Jaipur Bench. It cannot be said to be so in the present case. Similar is the position in the case of V.D. Kumarappan (supra) where the landlord could not object to the tenant getting his licence to exhibit films in the theatre in the premises concerned. MSEB undoubtedly has a locus inasmuch as respondent No.2 will be supplying power to the defaulter of MSEB and it will receive power with impunity without honouring the bills of MSEB.

19. Mr.Mody appearing for respondent No.2 is right in pointing out that the object of the Act amongst others is to liberalise the power sector. At the same time, it cannot be ignored that as far as the CPPs are concerned, there is no specific provision exempting them from the requirement of obtaining a licence from respondent No.4, if they are distributing or transmitting power. Prior to these provisions, the CPP could be set up only with the permission of MSEB and MSEB did not permit the party setting up the CPP to sell power to the others. This was also in the conditions imposed when respondent No.2 applied for the licence earlier to MSEB. Now, it can set up a plant and has been permitted to set up. However, when it comes to surplus power and when it is transmitted and distributed to another party for a price, the Act does not exempt such a party from obtaining a licence. The provisions are unambiguous in that behalf.

20. That apart, we are essentially concerned with the construction of Sections 12 to 15 of the new Act i.e. the Electricity Act, 2003 which are clearly unambiguous. Mr.Joshi appearing for the petitioner-MSEB has rightly relied upon the

judgment of the Apex Court in the case of **A.P. Gas Power Corpn. Ltd. vs. A.P. State Regulatory Commission & anr. reported in 2004 (3) Scale page 616**. That judgment of the Apex Court was concerning similar provisions of the Andhra Pradesh Electricity Reform Act, 1998. Section 14 of this Act, which was on Licensing, provided in sub-section (1) thereof as follows:-

> " 14. Licensing:- (1) No person, other than those authorized to do so by licence or by licence or by virtue of exemption under this Act or authorized to or exempted by any other authority under the Supply Act shall engage in the State in the business of -
>
> (a) transmitting electricity, or
> (b) supplying electricity,
> (2) and (3) xxx xxx. "

While dealing with this provision, the Apex Court observed in paragraph 35 of its judgment in the case of A.P. Gas Power Corpn. Ltd. (supra) as follows:-

> " In absence of the element of self-consumption by the generating company, it would not fall in the category of captive consumption. It would surely be a supply to a non-participating industry and in that event it would be necessary to have a licence under the relevant provisions of law. "

Inasmuch as the relevant provision of the Andhra Pradesh Electricity Reform Act, 1998 is similar to Section 12 of the Electricity Act, 2003, we cannot but be guided by the said decision. It is also material to note that as far as the Andhra Pradesh Electricity Reform Act is concerned, Section 185 (3) of the Electricity Act, 2003 specifically provides that the provisions of the enactments specified in the Schedule, not inconsistent with the provisions of this Act, shall apply to the States in which such enactments are applicable. The third item in the Schedule is the Andhra Pradesh Electricity Reform Act, 1998 and is thus saved.

21. It is undoubtedly true that the object of the Electricity Act, 2003 is to take measures

conducive to development of electricity industry as the preamble of it itself states. It is also an Act to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity. The preamble lays down that the Act intends to promote competition in all these activities and protect the interest of consumers, to see that there is a supply of electricity in all areas, rationalisation of electricity tariff and transparent policies of various aspects and that there are appropriate regulatory authorities. This requires that only the authorised person should transmit or distribute the electricity or undertake trading therein. Section 17 of the Electricity Act, 2003 places certain restrictions on the licensees which are also in public interest and there are duties cast under Section 40 of the Electricity Act, 2003. The same is as a part of the entire regulatory mechanism. If the intention of the legislature was to give complete freedom to the CPPs to sell excess power, the legislature would have said so. The acceptance of the argument of Mr.Moody will mean that no such entities will be required to have any licence merely because 51% of their power is used for themselves. They will all

be outside the regulations contemplated under the Act. Such is clearly not the intention of the legislature. Besides, the rules of interpretation require that where the provisions are unambiguous, they must be read as they are. In the present case, as we have stated above, there is no need to read anything more into Sections 12 to 15 than the fact that such licences are mandatory to the CPPs, the moment there is an element of sale to a third party as observed by the Apex Court in the case of A.P. Gas Power Corpn. Ltd. (supra).

22. For the reasons stated above, the order impugned in the present petition is, on the face of it, contrary to the provisions of the Statute and will have to be held as illegal and bad in law. In the circumstances, we allow this petition and set aside the order dated 3rd August 2004 passed by respondent No.4-MERC. We declare that respondent No.2 cannot continue to sell its power to respondent No.3 any more unless it obtains a licence from respondent No.4. It would be open to respondent No.2 to apply to respondent No.4 for that purpose which it may do within two weeks hereafter. Respondent No.2 may as well apply for appropriate interim orders when it makes such an

application. Respondent No.4 will decide such application after notice to the petitioner and after giving it an opportunity of being heard. Rule is made absolute as above. No order as to costs.

23. After this judgment was pronounced Mr.Jakhadi appearing for respondent No.2 and Mr.Menezes appearing for respondent No.3 apply for stay of this order for a period of eight weeks. Ms.Chavan appearing for the petitioner opposes this prayer. However, with a view not to deny any opportunity to the respondents, the order will remain stayed for a period of four weeks.

(H.L. GOKHALE, J.)

(S.C. DHARMADHIKARI, J.)